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No. 98-917

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

INMATES OF D.C. JAIL, *ET AL.*,
*Petitioners,*

v.

DIRECTOR, DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS, *ET AL.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## BRIEF IN OPPOSITION

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## BRIEF IN OPPOSITION

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## OPINIONS BELOW

The court of appeals decision is reported at 158 F.3d 1357.

## STATEMENT

The petition for a writ of certiorari should be denied or, in the alternative, the writ should issue and the decision below be affirmed.

### A. THIS CASE IS UNIQUE.

Although there is an obvious similarity between this litigation and that before the Court in *McGinnis v. Hadix*, U.S. No. 98-262, 67 U.S.L.W. 3336, *cert. granted*, Nov. 16, 1998, it differs in a crucial respect from both *Hadix* and all the appellate and trial court cases listed in the petition at 7 and 11 nn. 2-3: the fees here were awarded in litigation begun before statutory entitlement to attorneys' fees existed and was therefore brought without any expectation of fee-shifting.

Because of its unique status, there is no relevant conflict among the circuits. While a decision reversing *Hadix* will vacate the court of appeals decision in this case, affirmance in *Hadix* neither requires a reversal nor a remand in this case.

1. In this consolidated litigation, as in *Hadix*, the issue is whether the Prison Litigation Reform Act ("PLRA"),[1] enacting 42 U.S.C. § 1997e(d), limits attorneys' fees for work performed *after* the PLRA took effect on April 16, 1996. In that sense, it also resembles the cases in which four other courts of appeals have held that the PLRA applies to all post-Act work, no matter when the litigation began.[2] It is unlike cases which addressed the second issue in *Hadix*, whether the PLRA applies to fee petitions filed after its effective date for work performed *before* that date.[3]

2. This consolidated litigation began before there was a statutory entitlement to attorneys' fees and was litigated for over a decade on a *pro bono* basis. App. 4a. The *Campbell* suit was filed in 1971 on behalf of pretrial detainees; the *Inmates* suit was filed in 1975 on behalf of convicted prisoners.

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[1] Title VIII, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

[2] *Alexander S. v. Boyd*, 113 F.3d 1373, 1377 (4th Cir. 1997)(civil action filed 1990), *cert. denied*, 118 S. Ct. 880 (1990); *Winters v. Sissel*, __ F.3d __, 1999 U.S. App. LEXIS 870 (8th Cir. No. 97-4203, Jan. 25, 1999)(civil actions filed 1994-1995); *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997)(civil action filed 1993); *Madrid v. Gomez*, 150 F.3d 1030, 1033 (9th Cir. 1998)(civil action filed 1990); *but see*, *Blisset v. Casey*, 147 F.3d 218, 219 (2d Cir. 1998)(reserving issue; civil action filed 1983), *pet. for cert. filed*, No. 98-527 (Sept. 29, 1998).

[3] *See, e.g., Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996).

At the time the complaints were filed, the Civil Rights Act of 1871, 42 U.S.C. § 1983, did not apply to the District of Columbia, *District of Columbia v. Carter*, 409 U.S. 418 (1973), and the fee-generating statute, the Civil Rights Attorney's Fee Awards Act of 1976, P.L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988, had not been enacted.

The *Campbell* lawyers first applied for fees in 1985, fourteen years after filing the complaint, nine years after the amendment of § 1988, and six years after amendment of § 1983 to cover the District of Columbia.[4] The *Inmates* lawyers filed their application in 1985, ten years after their complaint. Both fee requests were for work performed after 1983. In 1988, the district court awarded fees for the 1983-1986 period at market rates because of the intervening changes of law.

Other than the present case, each of the appellate decisions cited in the petition involves litigation begun *after* § 1988 had been enacted. *See*, above at 2, n. 2. The same is true of all of the district court cases cited in the petition at 11, nn. 2-3.[5]

3. Unlike the other cases, then, this litigation implicates no retroactive effects. First, by definition, all of the work for which fees have been awarded was performed after the PLRA took effect. Second, at the time plaintiffs' counsel undertook the litigation, they could have had no expectation of fee-shifting. Even if, as the dissenting judge in this case wrote, "the triggering event" for retroactivity analysis is when a lawyer undertakes litigation (App. 11a), it is clear that the lawyers' initial participation in this litigation was not shaped by expectations of fee recoveries and that their subsequent

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[4] Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979).

[5] The two earliest district court docket numbers listed in the petition are for cases filed in 1977 and 1978; all the others were filed in 1989 or later.

representation was prescribed by ethical rules.[6] Although the lawyers received a windfall as a result of enactment of the amendments to §§ 1983 and 1988, neither petitioners nor the dissent have offered any precedent by this Court or others for the proposition that lawyers who bring a suit in a *pro bono* capacity thereafter acquire permanent "expectations" to fee awards at particular rates when Congress enacts an intervening fee-shifting statute, expectations that cannot be altered by later legislation. Here, the PLRA actually continues the windfall, just not as generously. When the lawyers began, they expected *no* remuneration for their labors; under § 1997e(d), fees remain awardable, but limited to $112.50 per hour. 42 U.S.C. § 1997e(d)(1),(3).[7]

As this Court has noted, "the presumption against retroactivity has consistently been explained by reference to the unfairness of imposing new burdens after the fact." *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994). The Court has therefore held that a statute is retroactive when it "attaches new legal consequences to events completed before enactment" or "impair[s] rights a party possessed when he

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[6] Under District of Columbia Code of Professional Conduct Rule 1.16(b)(1),(4), counsel cannot unilaterally terminate their representation but they may be released from further participation by the court if withdrawal can be accomplished "without material adverse effect on the client" or when continued representation "will result in unreasonable financial burden on the lawyer."

[7] Since adoption of the PLRA, the function of both sets of lawyers has been to monitor the Department of Corrections' compliance with court orders, liability having been established earlier. All fee contingencies have therefore been removed. *See Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995)(monitoring of prison-reform decree "resembles a cash cow"). In fact, counsel's work overlaps with monitoring by a court-appointed "special officer" and by a receiver for medical and mental health services, both paid for by the District of Columbia. *See* App. 3a.

acted." *Id.* at 269; *see* cases cited *id.*, n. 23. By those measures, the limitations imposed by § 1997e(d) in this case cannot be considered retroactive, whatever this Court may decide in *Hadix*.

### B. The Statute Plainly Applies to Awards for All Post-Act Legal Work.

There is one aspect of the issues before the Court in *Hadix* whose outcome could affect this case: if the Court should decide that the language of § 1997e(d) can *never* be construed to apply to post-Act work performed in litigation pending on the effective date of the Act.

That construction would do violence to the plain words of the statute. The District of Columbia has joined in an *amicus curiae* brief on the merits in *Hadix*, which argues that, by its terms, § 1997e(d) applies "in any action brought by a prisoner" irrespective of when the action was "brought." There is no need to repeat arguments already before the Court in *Hadix*. As the court of appeals succinctly noted, "[t]here is simply nothing in the phrase 'any action' that implies, let alone compels, a holding that the statute applies only to actions brought after passage of the Act." App. 7a.

There may be exceptional instances when a procedural statutory change, such as a limitation on attorneys' fees, will have such serious unanticipated consequences that the change should not apply in the particular case, despite the language of the statute. This Court has anticipated the need for some flexibility in those instances. *Landgraf*, 511 U.S. at 275 n. 29.[8]

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[8] Such instances should be extremely rare with respect to a law regulating counsel fees. Fees accrue as costs during the course of litigation just as other assessable costs. *See* § 1988 (fees are awardable "as part of the costs"); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988)(fees were regarded as elements of costs at common law). Future litigation

(continued...)

The present case, in which the fees at issue relate entirely to post-Act work and the plaintiffs and their lawyers began the litigation with *no* anticipation of fee-shifting, plainly does not warrant an exception to Congress's direction that § 1997e(d) apply "in *any* action brought by a prisoner."

No further review is necessary.

## CONCLUSION

The petition should be denied. Alternatively, the writ should issue and the judgment should be affirmed.

Respectfully submitted.

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[8] (...continued)
costs are reasonably considered incidental procedural matters, affecting "secondary conduct," to which intervening laws apply as a matter of course. *See Landgraf*, 511 U.S. at 276-277. Congress presumably was aware of that tradition when it enacted § 1997e(d) post-*Landgraf*.